NO. 62696-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RELFE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable George T. Mattson

BRIEF OF APPELLANT

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2. The trial court erred and prejudicially denied Relfe his Sixth and Fourteenth Amendment right to a defense when it refused to issue instructions on the lesser included offense of assault in the third degree.

3. The prosecuting attorney misstated the law of self-defense in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the evidence supports a claim that the defendant acted in self-defense, the absence of self-defense becomes an essential element of the charge that the State must prove beyond a reasonable doubt. In Washington, the "to convict" instruction must contain all of the elements of the crime. Must Relfe's conviction be reversed because the "to convict" instruction for the charged offense did not include as an element the absence of self-defense? (Assignment of Error 1)

2. The Sixth Amendment right to present a defense and the Fourteenth Amendment right to due process entitles a defendant to

have the jury instructed on his defense theory. Relfe theorized that he acted lawfully in defending himself but that the force he used was excessive, warranting the issuance of lesser included offense instructions on assault in the third degree. Did the court's refusal to issue these instructions deny Relfe his Sixth and Fourteenth Amendment right to present a defense? (Assignment of Error 2)

3. In Washington, a person is entitled to act on appearances in defending himself if he reasonably and in good faith believes that he is in danger of being injured, even if it later turns out he is mistaken. A person who is in a place that he has a right to be also has no duty to retreat if attacked. Did the prosecutor prejudicially misstate the law when he argued Relfe had to be in actual danger and implied that Relfe had a duty to retreat before he could defend himself? (Assignment of Error 2)

C. STATEMENT OF THE CASE

On a sunny July evening in 2002, appellant Michael Relfe was driving his Ford Probe on Peasley Canyon Road in south King County. 4RP 110.[1] While driving he inadvertently cut off a flatbed

[1] The verbatim report of proceedings consists of eight volumes. These are referenced herein as follows:

10/9/08	-	1RP
10/13/08	-	2RP
10/14/08	-	3RP

pickup truck driven by James Dixon Lee. 4RP 65. Lee flipped Relfe off. Ex. 41 at 3, 9. Relfe, unaware that he had cut Lee's vehicle off, believed that Lee was someone he knew engaged in a friendly macho exchange and flipped Lee off in return. Id.

That afternoon, Lee had been drinking beer with his brother-in-law, Mark Morgan. 4RP 65. Lee consumed three beers and Morgan drank four or five beers. 4RP 64; 5RP 96. When they ran out of beer, they decided to go buy more. 4RP 65.

When Relfe's Probe cut off Lee's truck, Lee became enraged. He accelerated his truck to pull up on Relfe's left side and made what another driver, Bob Cole, described as "violent contact" with the car. 4RP 109-11. The impact was severe enough to dislodge debris from the bed of the truck and to force Relfe's Probe to the right. 4RP 120; Ex. 41 at 3. To Cole, at first the Probe appeared likely to pull over; then Lee accelerated again, and Relfe pursued him to obtain Lee's license plate information. 4RP 111-12; Ex. 41 at 4. Cole drove home and immediately reported the incident to 9-1-1. 4RP 109, 118, 122, 124.

10/15/08	-	4RP
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While following Lee's truck, Relfe tried to call the police to report the incident. Ex. 41 at 7. Lee pulled off of Peasley Canyon Road and onto a residential street. Ex. 41 at 4-5. Both vehicles stopped in a driveway, and Lee got out of his truck, marched over to Relfe and beat and slapped him, and tried to damage Relfe's cell phone. Ex. 41 at 5. Lee then got back in his truck and turned onto another residential street, and Relfe pulled in front of Lee's truck. Id. Lee again got out of his truck and immediately went to Relfe's Probe, stuck his body inside Relfe's window and started manhandling, beating, and slapping Relfe. 5RP 11-12; Ex. 41 at 5. According to Relfe, this happened three times. Ex. 41 at 6.

Relfe had a concealed weapons permit and a revolver in his car. Ex. 41 at 9. He pulled out the gun and pointed it at Lee with the intention of scaring him, but pulled the trigger. Ex. 41 at 7-8. When Relfe shot Lee, Lee had turned his back and the bullet penetrated his left kidney and lodged in his ribs below his left nipple. 5RP 119, 126. Relfe remained at the scene to provide assistance to Lee and await the arrival of medics. Ex. 41 at 7-8; 4RP 24-26.

Relfe was prosecuted for one count of assault in the first degree with a firearm enhancement. At trial, Relfe asserted self-

defense. CP 84-87. The "to convict" instruction for the charged crime omitted the element that the State had to prove the absence of self-defense. CP 75. And in closing argument, the prosecutor repeatedly misstated the law of self defense. The prosecutor argued,

> [T]he defendant's definition of what justifies a man in shooting another man is not the law's definition. You've been given the law's definition requires [sic] that the defendant is in actual danger, that the use of force is only used to protect yourself.

6RP 52.

The prosecutor also repeatedly implied Relfe had a duty to retreat, noting that police officers asked Relfe,

> [L]ook, why are you following this guy, and why are you parking so close to him, you're pulling up right next to him, and the defendant says I had to do it, I had to get the driver's license. At fourteen, I was following in order to get the driver's license plate. . . He certainly didn't need to pull up right next to Mr. Lee each time. He was brave enough (inaudible) gun in his hand.[2]

6RP 73-74.

The prosecutor urged this same inference in his rebuttal closing argument, contending, "all the defendant had to do was sit

[2] Defense counsel objected to this last remark on the basis that it commented on Relfe's second amendment right to bear arms. 6RP 74.

and wait a moment longer (inaudible) and no one would've been shot." 6RP 113.

A jury convicted Relfe as charged and further found by special verdict that he was armed with a firearm at the time of the commission of the offense. CP 60-61.

At sentencing, the court found that "Mr. Lee, to a significant degree, was an initiator, willing participant, aggressor, and provoker of the incident," and further found "[t]his mitigating factor is sufficiently substantial and compelling to distinguish the offense in question from others in the same category." CP 192. The court also noted that Relfe, who at the time of sentencing was 65 years old, had several significant health problems, including prostate cancer (in remission), diabetes, hypertension, and advanced periodontal disease. Id. The court accordingly imposed an exceptional sentence downward of 120 months. CP 192-93, 200. Relfe appeals his conviction. CP 205-15.

D. ARGUMENT

1. INSTRUCTION 11, THE "TO CONVICT" INSTRUCTION FOR ASSAULT IN THE FIRST DEGREE, PREJUDICIALLY OMITTED THE ESSENTIAL ELEMENT THAT THE STATE MUST PROVE THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

a. Jury instructions on self-defense must make the relevant legal standard "manifestly apparent" to the jurors. Where self-defense is raised in a criminal prosecution in Washington, jury instructions must more than adequately convey the law of self-defense. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The instructions, "read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" Id. (quoting State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984) and State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1981)). A jury instruction misstating the law of self defense or relieving the State of its burden of proving the absence of self-defense is an error of constitutional magnitude and is presumed prejudicial. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); LeFaber, 128 Wn.2d at 900.

b. Where the issue of self-defense is raised, the absence of self-defense becomes an element of the offense. Principles of due process require the State to prove the essential elements of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); City of Seattle v. Norby, 88 Wn. App. 545, 554, 945 P.2d 269 (1997); U.S. Const. amend. 14; Const. art. I, § 3. In Washington, where the issue of self-defense is raised, the absence of self-defense becomes an essential element of the offense which the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621-23, 683 P.2d 1069 (1984); accord LeFaber, 128 Wn.2d at 373; State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007).

c. The trial court improperly omitted the absence of self defense element from the "to convict" instruction for the charged offense. Our Supreme Court has recognized that in Washington, the right to trial by jury is broader and provides greater substantive protections to criminal defendants than are afforded under the federal constitution. State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 941 (2003); Const art. I, §§ 21, 22. The "inviolate" right to an impartial trial by jury in Washington is one that is "deserving of

the highest protection." Id. at 150 (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)).

The scope of the jury trial right in the Washington Constitution is defined by "Washington law that existed at the time of the adoption of our constitution." Smith, 150 Wn.2d at 151. In 1890, shortly after the state adopted its constitution, the Court found fundamentally unfair a jury instruction that omitted a necessary element of conviction. McClaine v. Territory, 1 Wash. 345, 352, 25 P. 453 (1890). By giving an incomplete essential elements instruction, "the rights of the defendant were not wholly protected." Id. at 354. The McClaine Court found the defendant "had a right to have the law governing his case plainly, explicitly, and correctly stated. This was not done. It follows that the judgment must be reversed . . . ." Id. at 355.

This fundamental principle has guided Washington's modern-day jurisprudence on the right to an accurate and complete elements instruction. "A 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Moreover, a reviewing court may not rely on other

instructions to supply the missing element from the "to convict" instruction. Id. at 262-63. Reversal of the conviction is required if the omission or misstatement in the jury instructions relieves the State of its burden of proving every essential element of the crime. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

d. The omission of this essential element was a structural error that requires reversal of the conviction. The Washington Supreme Court has held that the omission of an essential element from the "to convict" instruction is a structural error that requires reversal of the conviction. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.2d 1000 (2003) (agreeing that some errors in jury instructions, such as when the court fails to instruct the jury on all the elements of the crime, are structural and require automatic reversal of the conviction) (citing Brown, 147 Wn.2d at 339 and State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)); see also State v. Eastmond, 129 Wn.2d 497, 503, 919 P.2d 577 (1996) (holding the omission of an element of the crime from the "to convict" instruction produces a "fatal error" by relieving the State of its burden of proving every essential element beyond a reasonable doubt). Although in State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the Court rejected the contention that the absence of

self-defense had to appear in the "to convict" instruction, this holding has been substantially abrogated by Smith, Brown, Eastmond and DeRyke.

The absence of self-defense was an essential element of the crime of assault in the first degree that the State had to prove beyond a reasonable doubt. Acosta, 101 Wn.2d at 621-23; Woods, 138 Wn. App. at 198. This Court should conclude the omission of this element from the "to convict" instruction was a structural error requiring reversal of Relfe's conviction.

e. Alternatively, the omission of this essential element from the "to convict" instruction was prejudicial beyond a reasonable doubt. Even assuming arguendo that this Court does not agree the omission of an essential element from the "to convict" instruction is structural error, as noted, a jury instruction that relieves the State of its burden of proving the absence of self-defense beyond a reasonable doubt at a minimum is of constitutional magnitude, and presumed prejudicial. Walden, 131 Wn.2d at 473; LeFaber, 128 Wn.2d at 900. Here, the State may claim that the omission of the absence of self-defense element from the "to convict" instruction for the charged crime was not prejudicial

because other instructions explained this burden. This claim should be rejected.

Only a single instruction explained the State's burden with respect to self-defense. Jury Instruction 20, derived from WPIC 17.02, provided:

> It is a defense to a charge of Assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 84.

Although this instruction explained the State's burden of proof, it did not make the relevant legal standard "manifestly apparent" because it did not emphasize that the absence of self-

defense was an element of the charged offense. Indeed, read in conjunction with the "to convict" instruction, this statement of the State's burden was likely to confuse the jury. The "to convict" instruction told the jurors it was their duty to convict if they found the State had proved the elements of assault in the first degree beyond a reasonable doubt without reference to the absence of self-defense. CP 75. At the same time, Instruction 3 told the jurors that the State, as the plaintiff, "has the burden of proving each element of the crime beyond a reasonable doubt." CP 67 (emphasis added).

Yet Instruction 20 simply characterized self-defense as a "defense" without explaining that a self-defense claim became an ingredient of the charged crime that the State bore the burden of disproving. While the instruction alone did not misstate the law, in light of the deficient "to convict" instruction, it failed to make the relevant legal standard "manifestly apparent." LeFaber, 128 Wn.2d at 900.

In multiple cases involving inadequate self-defense instructions, Washington courts have reversed the conviction. See e.g. LeFaber, 128 Wn.2d at 903 (rejecting State's claim that instructions sufficiently permitted defendant to argue his theory and

reversing conviction); Acosta, 101 Wn.2d at 624-25 (concluding that "[a]lthough petitioner's self-defense claim may appear doubtful in this case, this court will not substitute its judgment for the jury on factual matters"); State v. O'Hara, 141 Wn. App. 900, 907-08, 174 P.3d 174 (2007) (finding incomplete definitional instruction prejudiced defendant's ability to argue self-defense); Woods, 138 Wn. App. at 201-02 (finding despite defendant and victim's conflicting versions of events that faulty self-defense instruction required reversal of the conviction); State v. Rodriguez, 121 Wn. App. 180, 188, 87 P.3d 1201 (2004) (finding in first-degree assault prosecution based on a stabbing that erroneous instructions reduced the State's burden and required a new trial).

Here, in a uniquely hostile and dangerous display of aggression, Lee first deliberately collided his pickup truck into Relfe's passenger car. Then, once the cars had stopped, Lee, who in addition to being much younger and larger than Relfe was a former bodybuilder and kickboxer, physically slapped and beat Relfe. Relfe had every reason to fear for his life. This Court should conclude that under these facts, the State cannot prove the deficient jury instructions were harmless beyond a reasonable doubt.

2. THE TRIAL COURT ERRONEOUSLY REFUSED TO ISSUE THE DEFENSE-PROPOSED INSTRUCTIONS ON THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE THIRD DEGREE.

a. Relfe requested the jury be instructed on the lesser included offense of assault in the third degree. Relfe submitted proposed jury instructions on the lesser included offense of assault in the third degree. CP 50-52. Relfe argued the instructions were warranted under the following interpretation of the facts:

> [L]et's say that Mr. Relfe pulls out his gun, he intends to scare [Lee], and this is a person who's just assaulted him, if you take the facts in a light most favorable to Mr. Relfe, and then he shoots the gun intending to scare him, and then he hits Mr. Lee, I think that could be construed as negligence.

8RP 2-3.

Relfe explained that this theory would go toward a failed self-defense claim: "if it's lawful force to brandish a gun or even to fire a warning shot, then it's not an assault, and, therefore, it is a negligent shooting." 8RP 3.

The court disagreed, reasoning:

> I think that's not correct because he's intending to create the apprehension of fear by firing, and that's an assault, and the fact that he actually hits him doesn't change the fact that it's an assault. Even if he didn't

> hit him, it would be assault in the 2nd degree if it's not self-defense. . . if it's with lawful force, it's self-defense. You're out of the box at that point because the definition of lawful force when I fire a gun at somebody is I better have a bloody good reason for it. So if it's lawful force, it's self-defense by definition.

8RP 7. On this basis, the court declined to give the instruction.

b. Where it is supported by affirmative evidence, an accused person is entitled to a jury instruction on a lesser offense. Generally, an accused may only be convicted of offenses contained in the indictment or information. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989). Pursuant to statute, however, an accused "may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006.

Where requested, an accused is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) viewed in the light most favorable to the defendant, the evidence in the case supports an inference that the lesser offense was committed (factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (overruling State

v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996)); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, because assault in the third degree is a lesser degree offense of assault in the first degree, only the factual prong is relevant.

In applying the factual prong of the Workman test, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The instruction should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

c. Relfe was entitled to an instruction on assault in the third degree. The trial court reasoned that because Relfe told Detective Migita that he shot Lee intentionally, he was not entitled to an instruction on third degree assault. 8RP 7. This conclusion slights the portion of Relfe's statement in which he said that his intentions in discharging his weapon were "just to scare [Lee]." Ex. 41 at 7. Relfe explained he "wasn't aimin' at him. . . I was just, I just pointed it. . . to scare him." Id. at 7-8.

Under Relfe's theory, although he intentionally pointed the weapon at Lee, he negligently discharged it. This theory was supported by RCW 9A.36.031(1)(d), which provides that a person is guilty of assault in the third degree if, with criminal negligence, he causes bodily harm to another person by means of a weapon. This theory also aligned squarely with Relfe's self-defense claim: the jury could have found that Relfe was entitled to act on appearances of actual danger by brandishing his gun or even firing a warning shot, but that he acted negligently when he actually struck Lee with a bullet. The court did not disagree that assault in the third degree was a lesser included offense of assault in the first degree, but failed to understand Relfe's argument.

The request for a third-degree assault lesser included instruction was analogous to the issuance of manslaughter instructions in a justifiable homicide case. In that circumstance, where a person is prosecuted for premeditated or intentional murder and the evidence supports the inference that he acted recklessly or negligently in defending himself, the court must instruct the jury on the lesser included offense of manslaughter. State v. Schaffer, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998); State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981).

In Schaffer, the defendant shot the victim five times including twice in the back. 135 Wn.2d at 358. The Court held this evidence "was sufficient to support a finding that he recklessly or negligently used excessive force to repel the danger he perceived." Id. In this case, the same inference – that Relfe "used excessive force to repel the danger he perceived" – supported Relfe's claim of imperfect self-defense, and consequently required the issuance of an instruction on third-degree assault.

d. The court's refusal to issue the instruction prevented Relfe from arguing his theory of defense to the jury. An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); Winship, 397 U.S. at 364. If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

In limiting Relfe to an all-or-nothing verdict where either the jury could acquit if it concluded the force used was lawful, but had to convict if it did not, the trial court necessarily barred

consideration of Relfe's imperfect self-defense claim. Stated differently, if the jurors found Relfe was entitled to act on appearances in using force to defend himself, but that the force used was excessive because Lee was unarmed and suffered severe injuries, the jurors could have concluded their only option was to convict Relfe of the charged crime of assault in the first degree.

In some circumstances, the failure to give a lesser-included offense instruction may be harmless error where, although the trial court wrongly fails to give a lesser-included offense instruction, a jury is instructed on an intermediate offense but convicts the defendant of the greater crime. See e.g. State v. Guilliot, 105 Wn. App. 355, 368-69, 22 P.3d 1266, review denied, 145 Wn.2d 1004 (2001); State v. Hansen, 46 Wn. App. 292, 296-97, 730 P.2d 706 (1986), opinion modified by 737 P.2d 670 (1987). For example, if in a first-degree murder prosecution the court instructs the jury on both first- and second-degree murder, but declines to issue a manslaughter instruction, the failure to give the manslaughter instruction would be harmless if the jury rejected second-degree murder and rendered a conviction on the greater crime. Guilliot, 105 Wn. App. at 368-69. The rationale for this rule is that if the jury

had believed the accused was less culpable, it would have convicted on the intermediate offense, thus issuance of the requested lesser included offense instruction would not have affected the verdict. Courts have disapproved, however, circumstances where jurors are given an all-or-nothing choice. Beck, 447 U.S. at 634; Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

The test for whether an error in failing to instruct on a lesser included offense requires reversal is whether "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." Hansen, 46 Wn. App. at 297 (emphasis added). In Hansen, for example, the Court found the trial court's refusal of an unlawful imprisonment instruction in a first-degree kidnapping prosecution harmless where the court issued a lesser-included offense instruction on second-degree kidnapping. The Court concluded the jury's rejection of second-degree kidnapping signaled it would have also rejected the similar but lesser offense of unlawful imprisonment. Id. at 297-98.

Here, however, the instruction on assault in the third degree was a non sequitur to the assault in the second degree instruction.

This is because both the assault in the second degree and the assault in the first degree charges solely asked the jurors to decide whether Relfe's use of force was lawful, without asking them the additional and, under these facts, the more important question whether his use of force was lawful but excessive.

Jury instruction 21, pertaining to the law of self-defense, informed the jury,

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force was reasonable to effect the lawful purpose intended.

CP 85.

Given the extent of Lee's injuries, the jury could have concluded the first prong of this definition was satisfied, but that the second prong was not. As a consequence, in light of the severity of Lee's injuries, a conviction on the greater crime of assault in the first degree instead of assault in the second degree does not mean that the jury – if asked to decide the alternative question whether Relfe's use of force was excessive and therefore negligent – would have rejected the lesser included offense of assault in the third degree. Because "the factual question posed by the omitted instruction" was not "necessarily resolved adversely to the

defendant under other, properly given instructions," Hansen, 46 Wn. App. at 297, this Court should conclude the failure to issue the assault in the third degree instruction prevented Relfe from arguing his theory of defense. Relfe is entitled to a new trial at which the jury must be instructed on the lesser-included offense of assault in the third degree.

3. THE PROSECUTOR REPEATEDLY MISSTATED THE LAW OF SELF-DEFENSE IN CLOSING ARGUMENT.

a. The prosecutor's statement that the jury had to find Relfe was in actual danger misstated the law of self-defense. The prosecutor commenced his closing argument by telling the jurors Relfe's "definition" of self-defense was wrong and that the "law's definition" required Relfe be in "actual danger" in order to be justified in using force against Lee. 6RP 52. This was a blatant misstatement of the law.

Contrary to the State's assertion, a claim of self-defense is evaluated under both a subjective and objective standard. Walden, 131 Wn.2d at 474. The subjective component requires the jury to stand in the defendant's shoes and consider the facts and circumstances known to the defendant, while the objective component requires the jury to evaluate what a reasonably prudent

person similarly situated would do. Woods, 138 Wn. App. at 198; CP 84 (Jury Instruction 20). It is on this basis that jurors must be instructed that a person is entitled to act on appearances if he believes in good faith and on reasonable grounds that he is about to be injured, even if it might afterwards develop he was wrong about the extent of the danger. Woods, 138 Wn. App. at 201-02; WPIC 17.04. The State thus misstated the law by urging the jurors to conclude that to be legitimate, Relfe's self-defense claim required proof that he was actually in danger.

b. The prosecutor's repeated statements that Relfe did not need to follow Lee or confront him created the prejudicial inference that Relfe had a duty to retreat. The prosecutor also repeatedly urged the jurors to conclude Relfe had a duty to retreat, suggesting that Relfe acted unreasonably when he pursued Lee and when he confronted Lee with a gun, and that all Relfe had to do was "sit and wait a moment longer … and no one would've been shot." 6RP 73-74, 113. But where a person is in a place where he or she has a right to be, the law imposes no duty to retreat. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

According to statute, a person who is involved in an accident that causes damage to another vehicle

> shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with[.]

RCW 46.52.020(3).

As the trial court found, Relfe, who was driving on a public road and the victim of a hit-and-run had "a legal right to pursue the opportunity to identify this person." 8RP 33. Addressing the question whether it was "appropriate for [Relfe] to pursue," the court stated,

> I think it was appropriate legally to pursue someone who owes you a duty to provide their identification and/or render aid if necessary. They didn't do that so he had a right to be where he was even if it amounted to following this guy, and so when he was stopped behind the guy, I think he had no duty to retreat.

8RP 33-34.

c. In light of the erroneous jury instructions, the prosecutor's comments were prejudicial. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79

L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. 5; 14; Const. art. I, § 3.

Relfe neither had to establish he was actually in danger, nor did he have a duty to retreat from the confrontation with Lee. By misstating the law of self-defense on these two points, the prosecutor was able to bolster his claim that Relfe's response to Lee's dangerous and aggressive behavior was unreasonable. Although defense counsel did not object to the prosecutor's misstatements, the comments were particularly prejudicial in light of the deficient and contradictory jury instructions. This Court should reverse Relfe's convictions and remand for a new trial.

E. CONCLUSION

This Court should conclude the trial court issued a deficient "to convict" instruction on the charged crime and that Relfe was denied his right to present a defense when the court refused to instruct the jury on the lesser included offense of assault in the third degree. This Court should conclude these errors were compounded by the prosecutor's repeated misstatements of the law of self-defense in closing argument. Relfe's conviction must be reversed and remanded for a new trial.

DATED this _____ day of July, 2009.

Respectfully submitted:

_____
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